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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Freda

Serial No. 75888260

Keith M. Stolte of McDermott Will & Emery for Gerald P. Freda.

Karla Perkins, Trademark Examining Attorney, Law Office 102
(Thomas Shaw, Managing Attorney).

Before Hohein, Bucher and Rogers, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Gerald P. Freda, a United States citizen, has filed an application to register the term "FOODBIDS.COM" as a service mark for "on-line auction services in the area of wholesale food and related products; [and] providing a web site on global computer networks featuring an interactive on-line auction and bidding process featuring food products, food preparation products, food service products, food handling services, food distribution services, food storage services, food transport

services, food inspection services, and restaurant, kitchen and dining room equipment and products."¹

Registration has been finally refused under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the basis that, when used in connection with such services, the term "FOODBIDS.COM" is merely descriptive of them.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

It is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987) and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is

¹ Ser. No. 75888260, filed on January 5, 2000, which is based on an allegation of a bona fide intention to use such term in commerce.

determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

Preliminarily, we note as background that applicant, in its response to the second Office Action, stated that it "is still in the process of developing how the auction services would operate." Applicant further indicated, however, that:

Again, Applicant has not yet adopted the exact system for the bidding process, but contemplates that the process may include suppliers setting a firm price for their goods and services, and consuming entities agreeing to this set price. Alternatively or even concurrently, consuming entities may be invited to describe their needs for goods and services and invite suppliers to set a purchase price at which they would sell the goods and services. The bidding process may also permit the supplier to set a minimum price and invite consuming entities to place competing bids until a set time is reached--the highest bidder is then obligated to purchase the goods or services at the

highest bid price. The bidding process may also permit the consuming entity to describe its needs and set a maximum price and invite suppliers to place competitive lower bids for prices at which the suppliers would sell the goods or services--the lowest supplier is then obligated to sell the goods or services at the lowest price bid. The bidding process may well have a combination of these procdures [sic].

Applicant argues in its brief that the record in this appeal reflects that there nonetheless has been a failure "to demonstrate a *prima facie* case that the mark is merely descriptive" of its on-line auction services. In particular, as to the evidence made of record with the final refusal, which applicant characterizes as "20 terse Nexis excerpts out of a field of 193 in which the word food appeared near a formative of the word bid," applicant contends that "[n]one of these excerpts, on their face, ... describe[s] a formal auction service involving food or food service products and services." While additionally pointing out that, in response to applicant's request for reconsideration, "the Examining Attorney supplied five more complete Nexis articles, a dictionary excerp [sic] for the term auction (demonstrating that bids are made at auctions) and three ... third[-]party web page printouts," applicant asserts that "[n]one of these materials show[s] the use of the term FOODBIDS or FOOD BIDS in connection with an on-line auction

service in the food service industry." Applicant maintains, in view thereof, that:

[B]ased on the record now before the Board, it has simply not been established that Applicant's mark, when used on or in connection with its online auction services ..., conveys an immediate idea about the services with any degree of particularity. The Examining Attorney has failed to demonstrate how the relevant purchasers would likely regard the term FOODBIDS.COM and there is no evidence that the relevant consumers would readily understand a connection between the mark and the Applicant's services. Instead, Applicant respectfully submits that the significance of the mark and specifically what it describes about the services is ambiguous and unclear. The Examining Attorney has left too much for speculation and assumption.

Applicant also indicates in its brief that it "is unable to locate any definition in any dictionary that defines the word FOODBIDS" and "submits that this term is not used by the trade or any other persons in the food service industry." Thus, applicant argues, "no one would be inconvenienced by the Applicant obtaining an exclusive right to use the word as a whole as a source indicator for its services." Moreover, applicant asserts that "FOODBIDS does not directly and only mean" an on-line auction service "featuring foods, various food related services or kitchen and dining room equipment" inasmuch as "[a] series of mental actions must take place in the mind of a prospective consumer before he or she arrives at the

possibility that FOODBIDS might have this meaning." That such a "series of mental activities" is necessary, applicant contends, demonstrates that "the mark as a whole is suggestive, not merely descriptive."

The Examining Attorney, on the other hand, maintains in her brief that "applicant's mark, FOODBIDS.COM, merely describes a feature and characteristic of the applicant's services." In particular, she contends that "[u]pon encountering the applicant's mark, prospective consumers will immediately and directly know that the services allow consumers to make or procure bids on food." As such, she urges that "[t]he mark forces no mental pause or flight of imagination to determine the nature of the services" and, thus, that "the mark is merely descriptive and is not entitled to registration on the Principal Register."

In support of her position, the Examining Attorney observes that "applicant's composite mark consists of the descriptive words FOOD and BIDS and a top level domain name .COM." She insists that, when considered "[a]s a whole, the combination FOODBIDS.COM fails to create a unitary mark with a separate and distinctive meaning." Instead, according to the Examining Attorney, "[t]he combined wording continues to import the same meaning as the individual component parts." Relying, specifically, on copies of certain dictionary definitions which

she furnished with her brief,² the Examining Attorney argues that (footnote omitted; italics in original):

The wording FOOD is defined as "[m]aterial, usually of plant or animal origin, that contains or consists of essential body nutrients, such as carbohydrates, fats, proteins, vitamins, or minerals, and is ingested and assimilated by an organism to produce energy, stimulate growth, and maintain life." *The American Heritage Dictionary of the English Language* 684 (4th ed. 2000). BIDS is the plural form of the word BID which is relevantly defined as "[t]o offer or propose (an amount) as a price," "[t]o mark an offer to pay or accept a specified price," "[a]n offer or proposal of a price" and "[t]he amount offered or proposed" *Id.* at 178. One need only consider the plain meaning of the words FOOD and BIDS to have a clear understanding of significant aspects of the applicant's services.

The top level domain .COM fails to function as a source indicator. Instead, it merely indicates that the user of the domain name is a commercial entity. The wording .COM is defined as an abbreviation of "commercial organization (in Internet addresses)." *The American Heritage Dictionary of the English Language* 367 (4th ed. 2000). COM is also defined as a "type of Internet domain assigned to URLs which are business or commercial entities" *Newton's Telecom Dictionary* 188 (2003).

² We grant the Examining Attorney's request therein that "the Board take judicial notice of the dictionary definitions for FOOD, BID and COM" attached to her brief since it is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 (TTAB 1981) at n. 7.

Furthermore, the ... Board has held that the top level domain designation ".com" does not have trademark significance or source indicating capability. *In re Martin Container, Inc.*, 65 USPQ2d 1058, 1060 (TTAB 2002) (The Board held CONTAINER.COM to be generic ... when used in connection with "retail store services featuring metal shipping containers" and "rental of metal shipping containers."); *In re CyberFinancial.Net, Inc.*[,] 65 USPQ2d 1789 (TTAB 2002) (The Board found as a whole BONDS.COM was no less generic than its constituents for use with, *inter alia*, online informational services regarding such financial products as debt instruments and related investments.)

The composite wording FOODBIDS.COM instantly conveys that the services involve the offer to pay or accept a specified price for material that is ingested in order to maintain life. Simply stated, the mark directly communicates that the services involve bids on food.

As further support for her position, the Examining Attorney relies on various excerpts of record from the "NEXIS" database which, she asserts, demonstrate that "the relevant purchasing public encounters the terms 'food bid' and 'food bids' used in a manner which descriptively refer to services involving bidding or the results of bidding services." The following excerpts are representative (emphasis added):

"Approved **food bids** for ice cream, juice and milk." -- Times Union (Albany, NY), August 9, 2001 (article headlined: "GOVERNMENT ACTION");

"The taste test winners will then be considered as the school district prepares

food bids for next year." -- Atlanta Journal & Constitution, February 15, 2001 (article headlined: "A lesson on school meals");

"**Food bids** Here's how Priceline.com grocery shopping works: *Name your price on the Web site *Your bid is accepted or" -- Sun Herald (Biloxi, MS), July 23, 2000 (article headlined: "SHOPPING.CHEAP PRICELINE LETS SHOPPERS NAME THEIR PRICE AT SUPERMARKETS");

"The **food bids** the board approved Monday will feed students from Aug. 5 through Jan. 14." -- Indianapolis Star, July 16, 2000 (article headlined: "Board gives its blessing to semester **food bids**");

"Approved the school lunch **food bid** awards to Ginsberg, Quandt's and Bevaco food services." -- Times Union (Albany, NY), February 26, 1998;

"Canteen's management fee was the highest among the four bidders, but its **food bid** was the lowest.

All bids are maximum allowable amounts, and if savings are realized through low food prices or other means, they will be" -- Morning Call (Allentown, PA), July 11, 1997 (article headlined in part: "COUNTY PRISON HAS RECEIVED A BID TO MAKE MEALS AT A COST OF 86-1/2 CENTS"); and

"In Tulsa, School Superintendent Harry Gowans and the school board were sorting out **food bids** to meet a state directive that a free school lunch program be established." - Tulsa World, January 18, 1997.

In addition, the Examining Attorney points out that "the website evidence, included in the record, shows use of the [same] descriptive wording by those in the relevant industry. For instance, as to the two printouts furnished with the final

refusal, the page from the "Virginia Market News Service" refers to "Food Bids & Purchases" under the heading "Market News," while the page from the "PROCUREMENT SERVICES GROUP" lists "Food Bids" for such "Solicitation Items" as "Bakery and Pudding Mixes," "Apple Juice," "Coffee, Decaffinated [sic]," "Mayonnaise, Reduce Calorie" and "Food Container with Lid." Similarly, with respect to the printouts attached to the denial of the request for reconsideration, a page from the "Cobb County Public Schools FOOD & NUTRITION SERVICES" states in reference to "food bids" that "[b]ids are awarded to the vendors who have the highest quality products and [the] best prices," with all "bids" being "annual bids, except produce." The other two examples consist of a reference to "Food Bids" in a page from an Indiana School Board website and a mention of "Food Bid Awards" in a page from the "KEDC BIDDING CONSORTIUM"³ website. The Examining Attorney maintains that such "website excerpts illustrate food bids in the context of government procurement through a bidding process."

We concur with the Examining Attorney that, when considered in its entirety, the term "FOODBIDS.COM" is merely descriptive of a significant characteristic or feature of applicant's services, namely, the food bids requested through

³ "KEDC" is indicated in the excerpt to stand for "Kentucky Educational Development Corporation."

and received by applicant's commercially available "on-line auction services in the area of wholesale food and related products," which it renders by "providing a web site on global computer networks featuring an interactive on-line auction and bidding process featuring food products," etc. The word "auction," the record shows, is defined by The American Heritage Dictionary of the English Language (3rd ed. 1992) in relevant part as meaning "[a] public sale in which property or items of merchandise are sold to the highest bidder." Strictly speaking, applicant is correct in arguing that none of the "[NEXIS] excerpts, on their face, ... describe[s] a formal auction service involving food or food service products and services." Nonetheless, it is clear that large institutions such as school districts and prisons routinely contract for their food needs with suppliers through what is essentially an auction process involving what are referred to in the trade as "food bids." The website excerpts, moreover, reflect the fact that such auctions can be, and in fact some are, conducted on-line through websites, which post food bids advertised by institutions and those offered by suppliers. Consequently, as both the evidence of record and applicant's remarks concerning the contemplated operation of its services make plain, food bids serve as the means by which, for example, institutional consumers can

indicate to suppliers the highest prices which they would be willing to pay for various specified food items, while suppliers, for instance, can utilize food bids to seek buyers for their particular food products at the highest prices which they are willing to offer to institutional customers.

The record, in short, is sufficient to demonstrate prima facie that the term "FOODBIDS.COM" immediately describes, without the need for speculation or conjecture, a commercial website which provides a listing of food bids as part of an on-line auction service in the area of wholesale food and related products. Nothing in such term is ambiguous, incongruous or otherwise requires the use of imagination or the gathering of further information in order for purchasers and potential customers of applicant's services to readily understand that bids on various food products may be made or obtained through the use of applicant's services. The "FOODBIDS" portion of the term sought to be registered by applicant has the same readily conveyed connotation as the combination of the words "FOOD" and "BIDS" into the phrase "FOOD BIDS" and, as will be later explained, nothing therein is changed or modified by the addition of the top level domain name ".COM" as an indicator of a commercial organization. See, e.g., In re CyberFinancial.Net Inc., 65 USPQ2d 1789, 1792 (TTAB 2002) [when used in connection with such services as "providing information regarding financial

products and services via a global computer network ..., with respect to taxable and tax exempt debt instruments," the "public would not understand BONDS.COM to have any meaning apart from the meaning of the individual terms ['BONDS' and '.COM'] combined"].

Furthermore, even if, as asserted by applicant, any potential competitor "would not be inconvenienced" by applicant's contemplated use of the term "FOODBIDS.COM," the fact that others in applicant's line of contemplated business may choose to describe the same or similar auction services by different words does not mean that the term "FOODBIDS.COM" is not merely descriptive of applicant's services. See, e.g., Roselux Chemical Co., Inc. v. Parsons Ammonia Co., Inc., 299 F.2d 855, 132 USPQ 627, 632 (CCPA 1962). It is also pointed out that, even if applicant intends to be or is the first or sole user of such term, that fact would not entitle it to registration thereof where, as here, the term has been shown to project only a merely descriptive significance in the context of applicant's services. See, e.g., In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983).

Finally, we note that although applicant does not appear to argue otherwise, the Examining Attorney is correct that the term ".COM," which serves as a top-level domain name in the context of applicant's services, "does not have trademark

significance or source indicating capability." See, e.g., 555-1212.com Inc. v. Communication House International Inc., 157 F. Supp. 2d 1084, 59 USPQ2d 1453, 1457-59 (N.D. Cal. 2001) [term "555-1212.com" held merely descriptive of "providing databases featuring telephone and directory information accessible via electronic communication networks" because, "[m]uch like the telephone number '411' for local calls, '555-1212' is the number one would dial (after an area code) to seek out telephone and directory information services outside of one's local area code" and, thus, "[t]o the average consumer, '555-1212.com' would indicate a commercial web site on the Internet which provides similar telephone and directory information"]; and 1 J. McCarthy, McCarthy on Trademarks & Unfair Competition §7:17.1 (4th ed. 2002) at 7-28.1 ["a top level domain ['(TLD)'] indicator [such as '.com'] has no source indicating significance and cannot serve any trademark [or service mark] purpose" and "[t]he same is true of other non-distinctive modifiers used in domain names, such as 'http://www" and "html"; consequently, because "the TLD '.com' functions in the world of cyberspace much like the generic indicators 'Inc.,' "Co.,' or 'Ltd.' placed after the name of a company," "[a] top level domain indicator like '.com' does not turn an otherwise unregistrable designation into a distinctive, registrable trademark [or service mark]"]. Thus, as indicated previously, the result is that the merely

descriptive significance of the words "food" and "bids," when combined to form the term "FOODBIDS," is not lost or diminished by the addition thereto of the designation ".COM" to form the term "FOODBIDS.COM." The designation ".COM," being a top level domain name, would instead be regarded as indicating a commercial website by the actual and potential customers of applicant's on-line auction services and by visitors to the website it provides. Such designation, therefore, is lacking in service mark significance. See, e.g., In re Martin Container Inc., 65 USPQ2d 1058, 1060 (TTAB 2002) ["CONTAINER.COM" for services of buying, selling and renting metal shipping containers "would immediately indicate a commercial web site on the Internet which provides containers"].

Accordingly, when used in connection with applicant's "on-line auction services in the area of wholesale food and related products" and its services of "providing a web site on global computer networks featuring an interactive on-line auction and bidding process featuring food products, etc.," the term "FOODBIDS.COM" in its entirety immediately conveys information that a significant feature or characteristic of such commercial services is the food bids which are part of the procurement process which applicant intends to render in connection with the wholesaling of food and food related

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products. Such term, therefore, is merely descriptive of applicant's services within the meaning of the statute.

Decision: The refusal under Section 2(e)(1) is affirmed.